Supreme Court, U.S.
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No. 99-1723

IN THE
Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT;
KLAMATH WATER USERS PROTECTIVE ASSOCIATION;
SAM HENZEL; HENZEL PROPERTIES, LTD.

Petitioners,

v.

ROGER PATTERSON; KARL E. WIRKUS; ELUID MARTINEZ;
PATRICIA BENEKE; BRUCE BABBITT; UNITED STATES
BUREAU OF RECLAMATION; UNITED STATES OF AMERICA;
PACIFICORP; YUROK TRIBE

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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The Petition for Certiorari demonstrated that the Ninth Circuit went far beyond the contract dispute before it to decide important, unlitigated questions of federal agency authority and contested water rights. The decision below arose from litigation between PacifiCorp, the operator of a federally-owned dam on the Klamath River in Oregon, and Petitioner irrigators who include longstanding users of water from the Klamath River Project, of which the dam is a part. As presented to and resolved by the district court on PacifiCorp's counterclaim for declaratory relief against Petitioners, the sole issue was whether Petitioners have rights against PacifiCorp, as third party beneficiaries under the 1956 dam operation contract. The district court held that they had no such rights *under the contract*, and that Petitioners thus had no basis to object to an amendment of that contract or to sue PacifiCorp *under the 1956 contract* for actions taken by it in managing the Klamath Project.

1. PacifiCorp, Petitioners and the United States all framed the issue before the Ninth Circuit as limited to the question of Petitioners' rights *under the 1956 contract*. (Pet. 7-9). The circuit court first acknowledged that limited focus of the case (Pet. App. 2a), and ruled unambiguously that Petitioners had no rights under the 1956 contract. (Pet. App. 9a-10a). The presence or absence of asserted tribal water rights has no bearing on the resolution of that question. Having resolved the only matter pled or litigated, the court below nonetheless proceeded, in a section headed "3. Indian Water Rights," to endorse the conduct of the Bureau of Reclamation in allocating water from the Project to tribal claims of the Yurok and Hoopa Tribes. (*Id.* at 12a-13a) as well as the Klamath Tribes in Oregon.

In the section at issue, the Ninth Circuit announced definitively—but incorrectly—that it had previously found that the water rights of the Yuroks and other Klamath Basin Tribes "carry a priority date of time immemorial." (Pet. App. 12a).

Although it did not assert that those supposed time-immemorial rights had ever been quantified, the court further announced, without analysis or discussion, that "[b]ecause Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators." (Pet. App. 12a-13a).

Petitioners ask this Court to summarily vacate these extraneous pronouncements by the Ninth Circuit, on the grounds that they exceed the authority of an Article III Court by opining on important questions of government authority and tribal rights in a case where those rights were not in issue, and do so in a manner certain to sow "legal confusion." *California v. United States*, 438 U.S. 645, 669 (1978).

The appropriateness of this relief is further demonstrated by the oppositions to certiorari that have been filed by the United States and by the Yurok Tribe, and by the fact that PacifiCorp, for whom judgment was entered below, has seen no need even to enter an appearance in this Court.

a. The United States concedes that the Ninth Circuit's recognition of Bureau of Reclamation responsibility to allocate water based on asserted water rights of the Tribes "may not have been strictly necessary" to the disposition of the case. (U.S. Opp. 9-10) But it seeks to make a virtue of the extraneous character of the challenged ruling, by pointing out that its deletion would have no effect on the judgment of the appellate court, and thus arguing that no action is required of this Court. (*Id.* at. 8). Petitioners certainly agree that the contract interpretation issue posed by PacifiCorp's counter-claim presented no occasion for the court below to opine on the matters addressed in Section 3, and that the summary relief Petitioners request could not conceivably effect the judgment in favor of PacifiCorp on the matter in issue.

Petitioners submit, however, that the Ninth Circuit's purported resolution of two issues of great sensitivity and importance that were neither presented nor litigated before it is the principal justification for the exercise of this Court's supervisory powers under Supreme Court Rule 10(a). The Rule recognizes as reasons for the grant of certiorari the fact that an appellate court "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." These powers are inherently flexible and adaptable to the circumstances of each case. *E.g., Thermtrom Products v. Hermansdorfer*, 423 U.S. 336 (1976) (supervisory powers invoked to rule that removal may not be denied due to heavy caseload), *overruled on other grounds, Quackenbush v. Allstate Ins. Co.* 517 U.S. 706 (1996); *Thiel v. Southern Pac Co.,* 328 U.S. 217, 225 (1946) (supervisory powers invoked to regulate manner by which jury panels are constituted).

Here, the Ninth Circuit's unsolicited musings can be vacated summarily, Rule 16(1), with no effect on the judgment and only a modest expenditure of this Court's time and energy. Such action would eliminate the risk posed by the decision below as a derelict in the field of water law. That risk stems from the probability that unconditional assertions of federal legal rights and powers, by a panel of a United States Court of Appeals, are likely to be taken seriously.

b. As the opposition of the Yurok Tribe illustrates, there will be no shortage of interested parties ready to urge, on whatever grounds, that the court below acted properly in deciding the matters raised in Section 3. The Yuroks contend that the issue of Reclamation authority was raised in Petitioners' initial complaint, and further, absurdly, that the dismissal of that complaint "did not change the nature of the case or the scope of the issues raised." (Yurok Op. 9). The Tribe further contends that the same issue was raised in

PacifiCorp's counterclaim. (*Id.* at 9-10). In this it is simply wrong, as was amply demonstrated in the Petition. (Pet. 7).

Finally, the Yurok's claim that since the Petitioners did not oppose the Yurok's intervention in the counterclaim, the "petitioners cannot now be heard to complain that the Yurok Tribe raised issues petitioners knew or should have known would be raised." (Yurok Opp. 11). This argument is equally meritless. Although the Yuroks were allowed to intervene in the action, they did not file a counterclaim or cross claim requesting any relief or seeking a declaration as to the limits of Reclamation's authority. It is no answer to the Petitioners' argument to say that we "should have known" this issue would be raised. (*Id.*). Here again, it is black letter law that an intervener, simply by filing briefs containing arguments, "cannot change the issues framed between the original parties." 7C Wright & Miller, *Federal Practice and Procedure* § 1920 (2d 1986) (*quoting Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141 (D. Cal. 1954)).

2. With regard to its statement that the asserted water rights of the Yuroks and Hoopas run from time immemorial, the Ninth Circuit clearly rested on a misreading of the *Adair* decision. The United States so concedes, and expressly acknowledges that *Adair* dealt only with the rights of the Klamath Tribes of Oregon, and not with the Klamath Basin Tribes, which include the Yuroks and Hoopas. (U.S. Opp. 11). The United States also acknowledges that Interior's Regional Solicitor has not even asserted Hoopa and Yurok water rights as found by the court below, with a priority date of time immemorial, but only with priority dates "at least as early as 1891"—a critical difference in view of the claims of many irrigators to rights arising before 1891. (*Id.* at 12-13 n.2).

The Yurok's brief also acknowledges that *Adair* did not address the rights of the Hoopa and Yurok Tribes, but nonetheless asserts that its reasoning applies "with equal force

to the water rights of the Yurok Tribe." (Yurok Opp. 15-16). It makes this claim notwithstanding the distinction between the priority dates of Indian water rights *conferred upon* the tribe by statute or executive order, and running from that date—as claimed by the Yurok—and of rights *retained by* the Tribe in a treaty, which by definition pre-date the treaty—as in *Adair*. (*See* Pet. 21-22 n.16). It is no answer to say, as do the Yuroks, that water rights arising in either manner "are entitled to the same legal protection." (Yurok Opp. 17). The critical question is the priority date that the rights are assigned within the prior appropriation system, which clearly is affected by whether they are created by treaty or executive order.

3. With regard to the authority of Reclamation to allocate water on an interim basis to unadjudicated tribal claims, this issue is complex and difficult, falling at the juncture of several sensitive legal areas, and should not be off-handedly resolved in a case where the question is not presented. The United States does not dispute that the issue is novel and previously undecided. Instead, the United States points out that Reclamation's allocation decisions are made on an interim basis only, and do not usurp the role of the Oregon judicial stream adjudication. (U.S. Opp. 10). It further contends that Reclamation has no practical alternative but to use its own best judgment pending the resolution of state proceedings to distribute water from federal projects in the West. (*Id.* at 11).

However, the claimed necessity referenced by the Government is met by a larger list of equally compelling issues and problems that arise if such authority is in fact recognized. Some of these issues are highlighted in the Petition, at 20 n.15 and neither the United States nor the Yuroks has addressed any of them. Most of these concerns have no answers that are wholly satisfactory, and among the most serious stem from the fact that Reclamation is only able to reallocate water from those users, like Petitioners, who rely on water coming directly from the Klamath Project. Thus, when Reclamation uses its

"best judgment" to reallocate water to the tribes, junior users who are free from Reclamation's control may continue to take water, while the Petitioners must answer the call of the tribes.

It is no answer that Reclamation's reallocation decisions apply only in the interim years, pending resolution of the Oregon stream adjudication. All water allocations are passing events whose effects may be unimportant in abundant years and devastating in dry ones. The power of Reclamation to allocate water away from one set of users, while leaving others unrestricted, is obviously highly significant during the years or decades in which it is exercised. (Of course, in this case, the Yurok and Hoopa Tribes reside in California and are not even parties to the Oregon adjudication.)

It may or may not, at the end of the day, be determined, either judicially or legislatively, that Reclamation should use "its best judgment" to distribute water pending state adjudication. If so, it may or may not be determined that certain procedural safeguards attend that process or that judicial review of a particular type must be available. But such conclusions are certainly not obvious, and raise numerous important questions requiring careful consideration. Here, the issue of that power has been decided *ipse dixit*, in a case where it was not presented for decision, let alone litigated by the parties or others with an interest in the outcome of the question.

4. In seeking summary relief from this Court, Petitioners do not in any way suggest, as the Yuroks contend (Yurok Opp. 12-13), that the abstention doctrine enunciated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), inflexibly precludes any federal determination of water allocation pending state adjudication. (Pet. 14-15). Instead, the Petition explains that "[w]hile *Colorado River* did not announce an inflexible rule against federal court involvement in determining water rights issues, it recognized a 'clear federal policy' rooted in the McCarran Amendment, of

avoiding 'piecemeal adjudication of water rights.'" (*Id.* (quoting 424 U.S. at 819)). This policy is a counsel of restraint to be weighed in the balance against other factors that may press for immediate resolution. Thus, a conceivable alternative that is preferable in several respects to Reclamation's exercise of the asserted allocation power — if it believes that tribal rights exist that require protection — would be a separate lawsuit brought by the Government to determine and protect the rights of the tribes and the Klamath Project irrigators against junior diversions. *Nevada v. United States*, 463 U.S. 110, 113 (1983).

Nor is there existing case law, as the Yuroks—but not the United States—suggest, making the question of Reclamation's allocation authority as recognized by the Ninth Circuit a foregone conclusion under the test articulated by *Colorado River*. The Yuroks rely upon *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987), as establishing the power and duty of federal agencies to allocate water based on their own assessment of tribal water claims. (Yurok Opp. 12) But the issue of agency authority was never challenged or discussed by the court. Even if it had been, in that case the Bureau of Indian Affairs acted pursuant to an express statutory mandate to Interior to regulate use of irrigation waters on the reservation. 832 F.2d at 1131; 25 U.S.C. § 381. In addition to that statutory directive, there was a specific regulation, which delegated authority to an "Officer-in-Charge" responsible for exercising his judgment in the proper operation of the project. 25 CFR § 171.1(c); *Joint Bd. of Control of the Flathead, Mission and Jocko Irr. Dist. v. United States* 646 F. Supp. 410 (D.Mont. 1986). Given that express grant of regulatory power, it does not at all follow that the recognition of such authority in the BIA where reservation water is concerned would mean that Reclamation necessarily possesses a parallel allocation authority over water flowing through a federal dam. The

special problems relating to Reclamation's inability to control all users, (*see* Pet. 20 n.15), argue to the contrary.

5. The disruptive effects of the language in issue stem from the unambiguous nature of the Ninth Circuit's assertions about Reclamation's allocation authority and responsibility, and about the adjudicated existence and priority of tribal water rights, and the court's clear error on the last point. Such statements by a federal appellate court on matters governed by federal law are likely to carry substantial weight.

There is no need to imagine when or how parties will invoke the authority of this gratuitous language in support of the propositions that it asserts. Obviously, the Tribe that actively solicited and is directly benefitted by the language can be expected to view it as dispositive of these issues, and the Yurok brief does not disappoint in this regard. (*E.g.*, Yurok Opp. at 7-11).

At the same time, even as it is imploring this Court to deny certiorari on the ground that the challenged language is dicta, the United States has recently cited this section of the Ninth Circuit's opinion as support for the very proposition that it here claims the case does not stand for. *See Pacific Coast Fed. of Fisherman's Ass'ns v. Bureau of Reclamation*, No. 00-1955 SBA (N.D. Cal. (Oakland Div.)) Federal Def.'s Opp. to Plts.' Mot. for Prelim. Inj. at 6 (June 12, 2000). In that case, Reclamation is contesting a motion for preliminary injunction brought by environmental groups who claim they have been adversely effected by the way that the Klamath Project is being operated. In defending the reallocation decision embodied in the project operation plan, Reclamation argued to the district court that "'[t]he Ninth Circuit recently affirmed that [Reclamation] must operate consistent with . . . Indian water rights . . .' *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000)."

The potential disruptive effects of the Ninth's Circuit's misstatement on the reach of its opinion in *Adair* are no less serious. The United States acknowledges to this Court the opinion's "imprecision," but inexplicably argues that this error is "unlikely to have meaningful, practical consequences." (U.S. Opp.13). But this attempt to minimize the impact of this error is also belied by its submission to the Northern District of California in the suit noted above. *Pacific Coast Fed. of Fisherman's Ass'ns v. Bureau of Reclamation, supra.* In the same sentence in which it claims that the issue of Reclamation's authority has been settled, the United States notes that the decision below "affirmed . . . that the Indian [Yurok and Hoopa] water rights are *senior* to those held by the United States for the Project." Fed. Def.'s Opp. to Plt.'s Motion, *supra.* (emphasis added) (citing *Klamath Water Users Protective Ass'n. v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000)).

Never does the United States advise that court, as it urges here, that the language in issue is mere dicta.

6. The sensitive character of the issues raised in this Petition has been accentuated by the recent petition for certiorari filed by the United States in *United States Dep't of Interior v. Klamath Water Users Protective Ass'n, petition for cert. filled*, 68 U.S.L.W. 3741 (U.S. May 22, 2000) (No. 99-1871). That case presents the question whether information provided to the Government, and specifically the Bureau of Reclamation, by Indian tribes in connection with tribal water claims—indeed the very tribal claims at issue in this case—is protected against public disclosure under Exemption 5 of the Freedom of Information Act, concerning internal agency deliberations. 5 U.S.C. § 552(b)(5). The Ninth Circuit there rejected the Government's attempt to avoid public disclosure. If certiorari is granted and the United States prevails in that case, then the power of Reclamation to make water allocation decisions based on unadjudicated tribal claims which was

recognized by the court below can be exercised under cover of secrecy, with tribal submissions in support of their claims free from any scrutiny by the public or by competing water claimants. Such a procedure is a far cry from the due process granted in a *judicial* adjudication of rights, and would put the power recognized below in a new light. Reclamation would thus be authorized to allocate water rights by a process in which *ex parte* agency contacts by Tribal claimants only would be permitted.

If, and only if, this Court declines on the present record to act summarily, as Petitioners request, to strike the offending language of Section 3 of the Ninth Circuit's opinion, Petitioners urge in the alternative that the Court hold this Petition on its docket pending the resolution of the United States's petition in case no. 99-1871, for further consideration at that time.

CONCLUSION

Petitioners pray that the petition for certiorari be granted, and an order issued directing that Section II.B.3 of the decision below be vacated.

Respectfully submitted,

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